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In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. WEINGARTEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1363

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. WEINGARTEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-7A)[1] is reported at 485 F. 2d 1135. The decision and order of the Board (Pet. App. 9A-30A) are reported at 202 NLRB No. 69.

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[1] "Pet. App." refers to the appendix to the petition. "A." refers to the separate appendix to the briefs.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8A) was entered on October 9, 1973. On December 29, 1973, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 8, 1974. The petition was filed on that date and was granted on April 29, 1974 (A. 101).[2] The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Section 8(a). It shall be an unfair labor practice for an employer—

[2] The case is set for oral argument in tandem with *Int'l Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, No. 73-765, which presents a similar issue.

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to refuse an employee's request for the presence of his union representative at an investigatory interview with the employer which the employeee reasonably believes may result in disciplinary action, and to require the employee to undergo the interview without such assistance.

STATEMENT

A. The Board's Findings of Fact

Respondent (the Company) operates a chain of approximately 100 retail stores, and its sales personnel are represented for collective bargaining purposes by Retail Clerks Union, Local 455 (the Union) (Pet. App. 14A). In past years each store had a lunch counter, but as new stores opened the lunch counter was replaced by a lobby department[3] (Pet. App. 14A; A. 80-81). Leura Collins was initially hired in 1961 to work behind the lunch counter in Store No. 2 (Pet. App. 17A; A. 30-31, 38-39). When hired, Collins was informed that all employees were entitled to a free lunch for each day worked (Pet. App. 17A; A. 32). In October 1970, Store No. 98

[3] This is a "more sophisticated" food operation, wherein employees prepare and sell a variety of specialty items such as barbecued meats, kosher foods, imported cheeses, and fancy breads (A. 80-81).

was opened for business and Collins was transferred there to work in the lobby (Pet. App. 17A; A. 32). After her transfer, Collins and all the other lobby department employees continued to take a free lunch each day (Pet. App. 17A; A. 31-32).

To guard against loss from shoplifting and employee dishonesty, the Company has a security department which employs individuals classified as "Loss Prevention Specialist[s]"; they work undercover in all the stores operated by the Company (Pet. App. 16A; A. 50-51, 53). Dishonesty on the part of an employee, when established to the Company's satisfaction, is ground for discharge unless exceptional mitigating circumstances exist (Pet. App. 23A, n. 7; A. 84-88). The collective bargaining agreement between the Company and the Union[4] provides that the Company cannot discharge an employee without giving "at least one (1) written warning notice of the specific complaint * * * to the employee and to the Union, except that no warning notice need be given to an employee, before discharge, if the cause of such discharge is dishonesty * * *" (Pet. App. 14A; A. 92).[5]

[4] The contract relevant here was entered into September 9, 1971, effective through September 9, 1974 (Pet. App. 14A).

[5] The contract further provides that:

> The Union may * * * file a written complaint with the Employer within seven (7) days after the Union receives notice of such discharge. Said complaint must be taken up within seven (7) days from the date it is filed with the Employer, by the Union's representative and the Employer's designated representative, and it may be referred to the Board of Arbitration in the event the Union and the Employer's designated representative fail to reach an agreement. Should the Board determine that it was an improper discharge, the Employer shall reinstate the employee in accordance with the finding of the Board of Arbitration. [A.92, Article 4.B.]

On June 15, 1972, "specialist" Don Hardy investigated a complaint that Leura Collins was taking money from the cash register (Pet. App. 18A; A. 52-53). Hardy spent that and the next day observing the lobby in Store No. 98, but did not notice anything unusual (Pet. App. 18A; A. 53). On June 17, Hardy went to Store No. 98 about noon, introduced himself to Store Manager Joe York, and told him that he had been observing the lobby for the past two days but had seen nothing indicating dishonesty by Collins or any other employee (Pet. App. 18A; A. 53, 68). York then stated that lobby employee Jewell Moody had just reported that on the previous day Collins had purchased a box of chicken which sold for $2.98, but had placed only $1.00 in the cash register (*ibid.*). After lunch, Hardy and York talked with Moody, who repeated what she had told York earlier that day (Pet. App. 18A; A. 53-54, 68-69).

York summoned Collins to a private area on the second floor where he and Hardy were waiting (Pet. App. 18A; A. 33, 55, 69). York introduced Hardy as a representative of the Company's security office who "would like to talk to her about a few things" (Pet. App. 18A-19A; A. 55, 69). Hardy asked Col-

lins whether she had purchased approximately $3.00 worth of chicken and paid only $1.00 for it. Collins replied, "I didn't get that amount of chicken * * * I got a dollar's worth of chicken * * * and I paid Jewell [Moody] for it" (Pet. App. 19A; A. 33-34, 55-56, 69). As Collins described her reaction (A. 34):

> So, I began to feel then, you know, that something was going to happen, and I got scared about my job, and I asked could I have Billie * * * the union representative there, with me.[6]

York refused her request[7] (Pet. App. 19A-20A; A. 34, 42-44, 56, 70). Several other times during the interview, Collins asked that her union representative be present; each time the request was denied (Pet. App. 19A-20A; A. 35-36, 42-43, 71).

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[6] Billie Brockett, the Union steward, was an employee at the store (A. 34, 77).

[7] Collins testified that York told her she "couldn't have" union representation (A. 34). York, who was corroborated by Hardy (A.56, 59-60), testified that Collins asked: "Shouldn't the Union be present?" And he responded: "Leura, I think it's kind of a private matter between us and the company, and yourself, and us, and I really think, it should be kept that way. I really don't see the need for it, because we're just trying, you know, asking questions and maybe clear up a matter" (A. 70). The Examiner concluded that, "Even assuming that Collins used the words Hardy and York attributed to her, * * * it was in her way of expressing herself, a request that a representative of the Union be present during her interrogation, and York's reply that he did not regard this as necessary was legitimately understood by her to be a denial of her request" (Pet. App. 20A).

As the interview progressed, Hardy asked Collins if she had "ever taken any money from the cash register" or if she had ever put some of the proceeds from a sale into her pocket rather than in the register (A. 62-63, 34). Collins replied that she had never done so. She explained that she had been working for the Company for 11 years, was the only support for herself and her son, and would not risk losing her job (A. 34). With respect to the chicken incident Collins told the investigator that the store had been out of the smaller chicken boxes the day before, so that the chicken she bought was put into a larger box than ordinarily used for a $1.00 purchase (Pet. App. 19A; A. 56, 69, 47). Hardy then left the interview to check with employee Moody, who confirmed that the store had been out of small size chicken boxes the day before and admitted that she did not know how many pieces of chicken were in the box Collins bought (Pet. App. 19A; A. 56, 69).

Returning to the interview, Hardy told Collins that her explanation was accepted and that the matter was cleared up (Pet. App. 20A; A. 56). Collins broke into tears and blurted out that "I have never taken anything from the Company that I haven't paid for except for the free lunches" (Pet. App. 20A; A. 35, 57, 70). Both Hardy and York immediately began to question Collins about employee free lunches, since they were unaware of such practice (Pet. App. 20A; A. 35, 57, 70-71). During the questioning, Hardy wrote up a statement which in-

cluded a computation that Collins owed the Company $160 for free lunches (Pet. App. 20A; A. 36, 58, 71-72). When Collins continued to insist that she was entitled to a free lunch, Hardy again left the interview to call his superior to check the matter.

As York described Collins' reaction (A. 71, see also Pet. App. 21A; A. 36):

> * * * Mrs. Collins said, "Couldn't I have Billie Brockett present?"
>
> I said, "Well, Leura, you know, it's still basically a private conversation between us, and we're just trying to clear up some matters."
>
> So, she had a few tears in her eyes. She wasn't hysterical or what you would call an emotional person about it. She had some tears and this type of thing, but not hysterical.

Hardy returned and completed taking a statement from Collins, which she refused to sign (Pet. App. 21A; A. 36, 63-64). Before the interview terminated, Hardy received a call from Company Vice President Hal Burnett who explained that it was the practice in some stores to give free lunches; Burnett had been unable to ascertain what the practice was at Store No. 98 (Pet. App. 21A; A. 58, 72). Hardy and York then ended the interrogation of Collins; they asked her not to discuss the matter with anyone and gave her the rest of the day off (Pet. App. 21A; A. 36, 72). However, Collins reported all aspects of the interview to her union steward; and, at the steward's suggestion, she informed the Union about it (Pet.

App. 21A; A. 36-37). The Union filed unfair labor practice charges with the Board (A. 2).[*]

B. The Board's Decision

The Board (Members Kennedy and Penello dissenting) concluded that the Company violated Section 8(a)(1) of the Act by denying Collins' request for union representation and continuing to interview her concerning allegations of dishonesty (Pet. App. 24A). The Board found that, since Collins was being interrogated about her possible acts of dishonesty during her employment, she "could certainly reasonably conclude that action might be taken by [the Company] which would put her job security in jeopardy" (Pet. App. 23A). Accordingly, following its prior decisions in *Mobil Oil Corp.*, 196 NLRB 1052, enforcement denied, 482 F. 2d 842 (C.A. 7), and *Quality Manufacturing Co.*, 195 NLRB 197, enforcement denied, 481 F. 2d 1018 (C.A. 4), certiorari granted April 29, 1974, No. 73-765, the Board held that "it is a serious violation of the employee's individual right

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[*] Following the interview with Collins, York discussed the question of free lunches with Lobby Department Manager Odoms and learned that taking them was a general practice (Pet. App. 21A; A. 74-75). The next day York issued orders that the practice cease immediately (*ibid.*). The charges filed by the Union not only covered the denial of union representation, but also alleged that the Company had violated Section 8(a)(5) of the Act by unilaterally changing a condition of employment. The Board, pursuant to the deferral-to-arbitration policy adopted in *Collyer Insulated Wire*, 192 NLRB 837, "dismissed" the latter allegation (Pet. App. 24A-26A, 29A-30A). No issue involving that action is involved here.

to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy" (Pet. App. 22A, quoting *Mobil Oil Corp., supra*).

The Board ordered the Company to cease and desist from "[r]equiring any employee to take part in an interview or meeting without union representation, if such representation has been requested by the employees and if the employee has reasonable grounds to believe that the matters to be discussed may result in his being subject to disciplinary action" (Pet. App. 28A).

C. The Decision of the Court of Appeals

The court of appeals denied enforcement of the Board's order. The court agreed with the Board that Collins had adequately requested union representation at the interview and that the Company had refused her request and continued the interview (Pet. App. 4A). However, characterizing the interrogation as a "preliminary fact-finding interview" (Pet. App. 5A), the court held that, "[t]o extend the scope of the Act's protection to such preliminary contacts between an employee and his employer would be to apply an overbroad interpretation to section 7." The court added: "We believe that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (Pet. App. 7A).

SUMMARY OF ARGUMENT

I.

Section 7 of the National Labor Relations Act guarantees to employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." When an employee and his union representative attend an investigatory interview which the employee reasonably believes may result in discipline, they are engaging in a clear form of protected concerted activity. The employee is seeking "aid or protection" against a perceived threat to his employment, while the union representative's presence is an expression of the interest and concern of the employee complement as a whole that none of their number be disciplined unfairly.

It is conceded that an employee is entitled to representation when challenging a decision to impose discipline. The employee's need for the protection of union representation when the employer's investigation threatens his job security is at least as great as it is after the decision to impose discipline has been made. Fright, inexperience, or ignorance may expose the employee to discipline which could have

been avoided had he been assisted by knowledgeable union representation. Moreover, grievance proceedings typically come only after discipline has been imposed; at that point, the employer would be more likely to attempt to justify his action, than to reexamine it in the new light contributed by the employee's representative.

Recognition that an employee has a statutory right to refuse to participate without union representation in an interview in which the risk of discipline reasonably inheres also harmonizes with actual industrial practice. "[T]here is a well-established current of arbitral authority sustaining the right of such representation * * *" *Chevron Chemical Co.*, 60 LA 1066, 1071 (1973). Moreover, collective bargaining agreements in major industries provide for union representation at investigatory interviews which are likely to lead to discipline.

The Board's position does not infringe upon any legitimate interest of the employer. The employer has the option of foregoing the interview if he prefers not to examine the employee in the presence of his representative. The employee under investigation would then have the choice of either proceeding without representation, or allowing the investigation to take its course without his participation and then attempting to defend himself at the subsequent grievance stage with the benefit of representation. Moreover, even if the employer allows the employee to be accompanied by a union representative, he is free to insist on obtaining the employee's, and not the representative's, account of the matter under investigation.

Precedents dealing with the employer's bargaining obligation in relation to the disciplinary process are not controlling here. The Board acknowledges that the duty to bargain does not arise prior to the employer's decision to impose discipline. However, an employer may not restrain his employees in their exercise of a right protected by Section 7 simply because the employer is not under an additional statutory obligation to bargain with the employee's union representative. See *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9.

II.

Leura Collins was warranted in fearing that discipline could result from her meeting with Company representatives Hardy and York. She was being questioned for suspected theft. Such an offense, if proven to the Company's satisfaction, could result in immediate discharge. Even though the Company representatives could not impose sanctions, their report would be the basis upon which those who would make that decision would act, without giving Collins any further opportunity to present her side of the story.

ARGUMENT

I. AN EMPLOYER VIOLATES SECTION 8(a)(1) OF THE ACT BY DENYING AN EMPLOYEE'S REQUEST FOR THE PRESENCE OF HIS UNION REPRESENTATIVE AT AN INVESTIGATORY INTERVIEW WHICH THE EMPLOYEE REASONABLY BELIEVES WILL RESULT IN DISCIPLINARY ACTION, AND BY REQUIRING THE EMPLOYEE TO PARTICIPATE IN THE INTERVIEW WITHOUT SUCH ASSISTANCE

Section 7 of the National Labor Relations Act guarantees to employees the right "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." All agree that the imposition of discipline is a proper subject of a grievance and that Section 7 protects the right of employees to present grievances to the employer through their union representative. Indeed, the court below acknowledged that an employee is entitled to union representation when the employer has decided "to impose disciplinary measures upon the employee," for otherwise "grievance hearings later on would merely put the seal on the employer's prejudgment" (Pet. App. 7A).[9] The issue here is whether Section 7 also entitles the employee to union representation at an investigatory interview which the employee reasonably believes may result in discipline against him.

[9] See also *National Labor Relations Board* v. *Quality Mfg. Co.*, 481 F. 2d 1018, 1024, n. 1 (C.A. 4), certiorari granted April 29, 1974, No. 73-765.

1. When an employee, accompanied by his union representative, attends an investigatory interview which the employee reasonably believes may result in discipline, the employee and the representative are engaged in "concerted activities for the purpose of * * * mutual aid or protection." The employee is seeking "aid or protection" against a perceived threat to his job status. The union representative, by his presence, is manifesting the solidarity of the other employees in the bargaining unit with the employee facing disciplinary action and their concern that punishment not be imposed unjustly.[10] His presence also assures the other employees in the bargaining unit that they will be afforded similar aid should they become vulnerable to discipline.[11]

[10] "The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection against unwarranted punishment is affected [footnote omitted]. The presence of a union steward allows protection of this interest by the bargaining representative." Comment, *Union Presence in Disciplinary Meetings*, 41 U. of Chi. L. Rev. 329, 338 (1974).

[11] "Employee protests designed to show support for a grievant and simultaneously to focus attention on the dispute have been held protected even though only a single employee is threatened by employer action [footnote omitted]. These cases have found mutual aid or protection in the assurance such protests afford all employees that they can rely on their fellow workers should they become targets of discipline [citing *National Labor Relations Board* v. *Peter C. K. Swiss Chocolates Co.*, 130 F. 2d 503, 505-506 (C.A. 2)]. * * * Although the

To interpret Section 7 as protecting an employee from compulsory attendance without union representation at an interview which he reasonably believes may result in discipline effectuates the policies of the Act by allowing concerted action at a time when it is most needed.[12] The employee's need for the protection of union representation at such an interview is at least as great as it is after the decision to impose discipline has been made.

Fright, inexperience, or ignorance may expose the employee to an improper fact determination which could have been avoided if he had the aid of knowledgeable union representation at his interview. If a

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union presence is unlike walkouts or work stoppages in that it comes at a time when no employer action has yet been taken, it is correspondingly less disruptive than the latter forms of concerted activity. Steward presence may in fact prevent creation of the type of situation in which walkouts and work stoppages occur * * *." *Union Presence in Disciplinary Meetings, supra,* at 339-340.

[12] In *Mobil Oil Corp.* v. *National Labor Relations Board,* 482 F. 2d 842, the Seventh Circuit acknowledged that, "[i]n a literal sense it may be true * * * that if a Union representative attends an interview with an employee, the two are engaged in 'concerted activity,' and also that their purpose is 'mutual aid or protection'" (*id.* at 846). It rejected the Board's position, *inter alia,* because of its view that the "basic thrust of § 7 is to enable employees to organize and to apply economic pressure against their employers in appropriate situations" (*id.* at 846-847). It is clear, however, that Section 7 is not limited to such situations, as the court below recognized in not accepting that part of the Seventh Circuit's reasoning (Pet. App. 7A). See *National Labor Relations Board* v. *Interboro Contractors, Inc.,* 388 F. 2d 495 (C.A. 2); *National Labor Relations Board* v. *Ben Pekin Corp.,* 452 F. 2d 205 (C.A. 7).

representative were present he could aid the employee by eliciting favorable facts, assuring that the employee's side of the story is fully told, and, if necessary, serving as a brake on overzealous and improper interrogation techniques. See *Thrifty Drug Stores Co., Inc.,* 50 LA 1253, 1261-1262 (1968); *Pick-N-Pay Supermarkets, Inc.,* 52 LA 832, 833-834 (1969). If, on the other hand, the employer makes his finding in a closed conference with the employee, from which the representative is excluded, it becomes increasingly difficult for the employee to vindicate himself at a later time and the value of representation at that time is correspondingly diminished. If a hearing is held prior to the imposition of discipline, the issue is no longer the employee's guilt or innocence, but only the severity of the discipline. A formal grievance challenging the employer's finding of guilt can ordinarily be filed only after the employee has been discharged or otherwise disciplined,[13] and, at that point, the employer would be prompted to at-

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[13] Collective agreements customarily provide that grievances concerning discharge may be filed only after the discharge. 1 CCH, LLR Union Contracts, Arbitration ¶ 59,520, pp. 84,988-84,989. Only 9 percent of union contracts require predischarge hearings (2 BNA Collective Bargaining Negotiations & Patterns 40:4), and only 12 percent provide for advance notification to the union of discharge (*id.* at 40:3).

Under the contract here, the Company was not required to give a warning notice prior to discharge if the cause for discharge was dishonesty (p. 4, *supra*). Accordingly, had the Company been satisfied, based on its investigation, that Collins was guilty of dishonesty, it could have discharged her without further notice.

tempt to justify his action, rather than to reexamine it.

The Act rests on the reality that "[a] single employee was helpless in dealing with an employer," and that "[u]nion was essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries* v. *Tri-City Trades Council*, 257 U.S. 184, 209. Its design is to establish the conditions of equality by protecting recourse to collective action and thereby to overcome the "relative weakness of the isolated wage earner caught in the complex of modern industrialism * * *." S. Rep. No. 573, 74th Cong., 1st Sess. 3. To compel the employee without the aid of union representation to submit to an interview which may lead to his discipline, tends to perpetrate the very inequality which the Act denounces, and to bar recourse to the very means which the Act safeguards to overcome that inequality. The Board's interpretation of Section 7 avoids this anomalous result. As the Board explained in *Mobil Oil Corp.*, 196 NLRB 1052:

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action * * *.

2. Recognition that an employee has a statutory right to refuse to participate without union representation in an interview in which the risk of discipline reasonably inheres harmonizes with industrial practice. Cf. *Fibreboard Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 211. Collective bargaining agreements often accord the employee the right to union representation at investigatory interviews which are likely to lead to discipline. See 1 BNA Collective Bargaining Negotiations and Contracts 21:22 (General Motors Corp. and Auto Workers, 76(a)); 27:6 (Goodyear Tire & Rubber Co. and Rubber Workers, V(5)); 28:15 (United States Steel Corp. and Steelworkers, 101.2).[14] Moreover, even where such a right is not explicitly provided in the collective bargaining agreement, "there is a well-established current of arbitral authority sustaining the right of such representation where the situation

[14] The fact that the right to union representation at investigatory interviews may be guaranteed by contract does not preclude it from also being guaranteed by statute. The right to representation at the grievance stage is conceded to be protected by the Act; yet it is commonly guaranteed by collective agreement as well. See generally Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Colum. L. Rev. 52, 66-80 (1957).

is such that the employee who is called in for interrogation has reasonable cause to anticipate that the interview will result in the development of information which will be utilized as the basis for disciplinary action against him." *Chevron Chemical Co.*, 60 LA 1066, 1071 (1973); accord: *Universal Oil Products Co.*, 60 LA 832, 834 (1973).

3. The right of participation of union representatives, at the employee's request has a beneficial effect for employers as well as employees, and has been applied by the Board so as to protect the employer's legitimate interests. The benefits which may accrue to an employer are well stated in *Union Presence in Disciplinary Meetings*, *supra*, 41 U. of Chi. L. Rev. at 344:

> Early union involvement will allow the steward to discourage the prosecution of frivolous grievances. Early union review of employer decisions will also give the employer an opportunity to correct errors that might produce ill feeling among employees. At the time of the meeting neither party is locked into any position, but as a grievance proceeds, the ability to compromise diminishes. The inadequacy of grievance procedures for fact finding affects both employers and unions. Union representation could guarantee a better understanding of the infraction charged, and early, informal consideration of the merits of possible grievances might reduce the costs that the employer must bear in formalized grievance procedures. [Footnotes omitted.]

See also *Independent Lock Co. of Alabama*, 30 LA 744, 746 (1958); *Caterpillar Tractor Co.*, 44 LA 647, 651 (1965).

At the same time the Board has construed Section 7 so as to avoid interference with an employer's prerogatives. As the Board stated in *Mobil*, *supra*, 196 NLRB 1052:

> The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.

Thus, an employer who considers that allowing employee union representatives to leave their work stations to participate in an employee interview would be unduly disruptive of the work schedule [15] may deny such permission.[16] The employee under investi-

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[15] In *Mobil*, *supra*, the Seventh Circuit expressed concern that "from the standpoint of management, and indeed the entire economy, the delays and costs associated with an adversary, or semi-adversary, fact-finding process may impose burdens on efficient management which a cost-conscious, competitive business cannot tolerate." 482 F. 2d at 846.

[16] However, the employer's legitimate concerns about disruption of the work schedule can usually be alleviated by rules requiring employees to obtain the assistance of off-duty stewards or scheduling interviews during non-work time. Cf. *Universal Oil Products Co.*, *supra*, 60 LA at 834-835 (1973).

gation would then have the choice of either proceeding without representation, or allowing the investigation to take its course without his participation and then attempting to defend himself at the subsequent grievance stage with the benefit of representation.

Moreover, even if the employer allows the employee to be accompanied by a union representative, he has no duty to bargain with the representative at that stage. The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation. As the Board emphasized in *Mobil*, *supra*, 196 NLRB 1052, n. 3: "we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations."

Finally, the Board's interpretation limits the employee's right to insist on representation as a condition of participation to situations where the employee reasonably believes the investigation will result in disciplinary action. As the Board emphasized in *Quality*, *supra*, 195 NLRB at 199:

> We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.[17]

Thus, the Board held in *Dayton Typographic Service, Inc.*, 176 NLRB 357, 360-361, that an employer meeting with employees to investigate proofreading errors, which was part of a quality control program, did not require the presence of a union representative.

4. The court below reached its decision here by following its earlier decision in *Texaco Inc., Houston Producing Division* v. *National Labor Relations Board*, 408 F. 2d 142, denying enforcement of 168 NLRB 361 (Pet. App. 5A). However, *Texaco* is distinguishable. In *Texaco*, the employer refused to allow the union representation at an interview conducted after the employee had been suspended. In the Board's view, the company, which already knew the facts concerning the employee and his alleged theft, was "concluding its 'case' against him in order to provide a 'record' to support disciplinary action, if deemed appropriate." 168 NLRB at 362. The Board, reasoning that imposition of disciplinary affects the employee's terms and conditions of employment, concluded that Section 8(a)(5) of the Act pre-

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[17] Nor is the "reasonable ground" standard objectionable because the violation will turn "on the subjective state of mind of the employee." *Quality*, *supra*, 195 NLRB at 200 (dissenting opinion). "'Reasonable ground' will of course be measured * * * by objective standards under all the circumstances of the case." *Id.* at 198, n. 3 (majority opinion).

cluded the employer from refusing to deal with the union, and dealing directly with the employee, concerning such terms and conditions.

The court of appeals, however, disagreed with the Board's characterization of the interview. It found that "[t]he evidence is overwhelming that the interview was investigatory in nature and there is absolutely no evidence that the [employer] sought to deal with [the employee] about the *consequences* of his alleged misconduct." It concluded that, "since the interview dealt only with eliciting facts and not with the consequences of the facts revealed, its subject matter was not within the scope of compulsory collective bargaining." 408 F. 2d at 144-145 (italics in original).[18]

The Board agrees that the duty to bargain does not arise prior to the employer's decision to impose discipline.[19] However, it does not follow from the fact that the employer's statutory obligation to meet with the union representative is confined to a disciplinary

[18] While the employer refused to allow the representative to be present, it also advised the employee "that he would not be required to continue with the interview if he did not wish to do so" (408 F. 2d at 144). Thus, under the Board's current view, the employer's conduct in *Texaco* would not have violated Section 8(a)(1) of the Act.

[19] See *Jacobe-Pearson Ford*, 172 NLRB 594, where the Board found that collective bargaining with the union was not required because the " 'potential' for discipline was remote and the purpose of the meeting" with the employee was "essentially for the gathering of information" (*id.* at 595). Cf. *National Can Corp.*, 200 NLRB No. 156, 82 LRRM 1096.

interview of the employee that the employer can compel the unrepresented attendance of an employee at an investigatory interview. Stated otherwise, an employer may not restrain his employees in their exercise of a right protected by Section 7 simply because the employer is not under an additional statutory obligation to bargain with the employee's union representative.[20]

The validity of the Board's conclusion that the Act protects an employee from compulsory attendance, without union representation, at an interview with his employer which he reasonably fears may result in discipline, is not impaired because some earlier decisions may be read as reaching a contrary conclusion. These decisions do not reflect a considered analysis of the issue.[21] Moreover, as the Court has

[20] For example, an employer may not discharge his unorganized employees who walk off the job in a body because he ignored their complaint about the lack of heat in the plant. *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9. Yet, since those workers do not have a statutory bargaining representative, the employer is under no obligation to meet and confer about the cold conditions in the plant.

[21] Thus, in *National Labor Relations Board* v. *Ross Gear & Tool Co.*, 158 F. 2d 607, 611-614 (C.A. 7), denying enforcement of 63 NLRB 1012, 1033-1034, the court found, contrary to the Board, that the meeting to which employee Ford was summoned did not involve a pending grievance, but only an attempt to iron out friction among the employees in her department. The court concluded that, in these circumstances, Ford's refusal to attend the meeting without the union committee amounted to insubordination, for which she was properly discharged. In *Chevron Oil Company*, 168 NLRB 574,

observed in another connection: "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way * * * and has modified and reformed its standards on the

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578-579, the Trial Examiner rejected the contention that it was a violation of the Act to deny employees union representation at a fact finding interview, noting that they were accorded representation at a subsequent meeting before discipline was actually imposed. The Board adopted the Examiner's decision without discussion of the issue. *Id.* at 574-575. Similarly, in *Dobbs Houses, Inc.*, 145 NLRB 1565, 1570, *Electric Motors & Specialties, Inc.*, 149 NLRB 1432, 1440, and *Illinois Bell Telephone Co.*, 192 NLRB 834, 835-836, the Board summarily adopted Trial Examiners' decisions which denied the right to union representation in an investigatory interview.

The other cases cited by the court below (Pet. App. 5A) are distinguishable. In *Wald Mfg. Co.*, 176 NLRB 839, the Trial Examiner stated, "I do not reach here the question whether if an employee expressed the desire for union representation at such an interview, the Company could lawfully refuse it * * *." (*Id.* at 846.) In *Texaco, Inc., Los Angeles Sales Terminal*, 179 NLRB 976, 987, the Trial Examiner found that the employee had no "reasonable ground for belief" that discipline would result from the interview. The Board adopted that finding and expressly declined to adopt the Examiner's "general discussion of an employee's right to union representation in other circumstances." *Id.* at 976, n. 1. In *Jacobe-Pearson Ford, Inc.*, 172 NLRB 594, the employer did not abridge the employee's right to union representation for he continued the investigation without interviewing the employee when the latter insisted on representation (*id.* at 598); the only question was whether, in so doing, the employer violated his bargaining obligation to the union (see n. 19, *supra*).

basis of accumulating experience." *Int'l Union of Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 674.[22]

II. COLLINS REASONABLY BELIEVED THAT THE INTERVIEW HERE MIGHT RESULT IN DISCIPLINE

As shown above (pp. 5-8), Collins had a reasonable apprehension that her interview might result in discipline. It is conceded that the employer was *in fact* investigating her alleged dishonesty. When Loss Prevention Specialist Hardy asked Collins whether she had taken more chicken than she had paid for, she became "scared about [her] job" and immediately requested the presence of her union representative. Her concern was warranted. The contract (*supra*, p. 4) provided that a single instance of dishonesty was grounds for discharge without the need for a

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[22] There has been a recent growth in the use of sophisticated techniques—such as closed circuit television, undercover security agents, and lie detectors—to monitor and investigate the employees' conduct at their place of work. See, e.g., *Warwick Electronics, Inc.*, 46 LA 95, 97-98 (1966); *Bowman Transportation, Inc.*, 59 LA 283, 286-292 (1972); *FMC Corp.*, 46 LA 335, 336-338 (1966). These techniques increase not only the employees' feelings of apprehension, but also their need for experienced assistance in dealing with them. Thus, often, as here and in *Mobil*, *supra*, an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. These developments in industrial life warrant a concomitant reappraisal by the Board of their impact on statutory rights. Cf. *Boys Markets, Inc.* v. *Retail Clerks, Local 770*, 398 U.S. 235, 250.

warning notice for the first infraction. Thus, if the Company decided that Collins had in fact committed the infraction, it could have discharged her without further warning.[23]

Before the Board, the Company argued that, since York and Hardy had no authority to impose discipline on Collins, there was no reason for her to expect discipline to result from their questioning. That argument misses the mark. For those who would make the decision to discipline Collins would do so on the basis of the facts elicited at the interview with Hardy and York. Collins would have no further opportunity to present her side before the decision was made. In such circumstances, she could reasonably believe that discipline might result from the interview. The Board was thus warranted in concluding that the Company violated Section 8(a)(1) of the Act by compelling Collins to participate in the interview without her union representative.

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[23] The court below stated: "We believe that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (Pet. App. 7A). Under the contract here, discipline could flow automatically from the employer's "finding" of guilt.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court with instructions to enforce the Board's order.

Respectfully submitted.

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